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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 213

MARK L. FRANCE, TRUSTEE,
Petitioner,

vs.

UNION BANK AND SAVINGS COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1498.

MARK L. FRANCE, TRUSTEE,

Petitioner,

vs.

UNION BANK AND SAVINGS COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

OPINIONS BELOW.

The statement as contained in the Petition for Writ of Certiorari regarding the opinions below is substantially correct but somewhat inexact in certain details. Since these are of secondary importance for purposes of a Petition for Writ of Certiorari, but nevertheless should not go unnoticed, the corrections are set out in Appendix A hereto.

JURISDICTION.

Respondent has no disagreement with Petitioner's statement of jurisdiction.

QUESTIONS PRESENTED.

The actual amount in controversy, on appeal, was and is $45,324.97, not $52,441.49. (See Petitioner's Appendix 43 A and Respondent's Appendix C.)

The questions here presented for review may be more accurately stated as follows:

Where, a year before declaring bankruptcy, a debtor grants to a secured party a UCC security interest in its stock of present and future accounts receivable, notice of which is duly filed, does the security interest in those receivables (the amount thereof being $45,324.97) which arose after the date of the last outstanding Promissory Note given for value (September 20, 1966) by the debtor to the secured party, and within four months prior to the adjudication of bankruptcy of the debtor, constitute a Section 60 bankruptcy voidable preference?

Subordinate issues are:

(a) When were those items of the stock of accounts receivable, which items arose after September 20, 1966, transferred to Union Bank as the term "transfer" is defined under Section 60 (a) (2) of the Bankruptcy Act (11 U. S. C. Sec. 96a. (2)), i.e., "so far perfected" that no subsequent contract judgment lien creditor could become prior in right to Union Bank?

(b) Whether such receivables are to be deemed transferred on account of an antecedent debt?

(c) Where Bank permits Debtor to collect and use the proceeds of accounts receivable in which receivables the Bank has a valid and sufficiently perfected security interest prior to and during the entire four month pre-bankruptcy period, and until the date on which said debtor ceases to do business, and such accounts receivable outstanding at the beginning of such period are roughly in the same

amount as the accounts receivable outstanding at the time the debtor ceases doing business, is the release of the proceeds of existing accounts receivable and the creation of new accounts such a substitution of collateral that the interest of the Bank in the new accounts cannot be preferential under Section 60 of the Bankruptcy Act?

(d) What impact, if any, does Burns' Ind. Stat., Sec. 19-9-108 (hereinafter referred to as UCC Section 9-108) have on the determination of whether or not a preferential transfer under Section 60 of the Bankruptcy Act occurred?

CONSTITUTIONAL PROVISION, PORTIONS OF THE BANKRUPTCY ACT AND PORTIONS OF THE UNIFORM COMMERCIAL CODE INVOLVED.

Petitioner has failed to set out certain particular pertinent portions of the Uniform Commercial Code, to wit: Sections 9-108, 9-205 and 9-301 (3). These and other sections of the Uniform Commercial Code appropriate to this case, together with Section 60 of the Bankruptcy Act, are set forth in Appendix B, *infra*, for convenient reference.

STATEMENT OF THE CASE.

We agree substantially with Petitioner's Statement of the Case; but certain details thereof are incorrect and certain omissions therein may be misleading. The correct facts are outlined in chart form set out in Appendix C hereto.

Petitioner's statement that the basis of the decision of the Court of Appeals was that the bank possessed a security interest in future accounts receivable that was so far perfected that the Trustee in Bankruptcy, "*despite* the power conferred upon him by the Bankruptcy Act", acquired no rights in the accounts receivable claimed by him, is misleading. The decision of the Court of Appeals in favor of Union Bank is clearly based upon the precise language

of the Bankruptcy Act and not at all contrary to or in conflict with the powers the Act confers upon a Trustee in Bankruptcy. The elements of the Court of Appeals decision in this regard are outlined in greater detail in Appendix D.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

The decisions below by the District Court and by the Court of Appeals are clearly correct.

Petitioner has wholly failed to demonstrate the existence of any substantial federal question which requires determination by this court.

By citing the running debate which has been carried on within the academic community of the legal world for the past nine or ten years, Petitioner attempts to lend substance to his claim of a purported conflict between Section 9-108 of the Uniform Commercial Code and Section 60 of the Bankruptcy Act, and to his further claim that the decisions below amount to a judicial amendment of Section 60 of the Bankruptcy Act by reading Section 9-108 of the Uniform Commercial Code into it.

There is no conflict, however, among the courts that have dealt with the issue here involved. All the decisions agree, not only as to the rule of law but also as to the basis for arriving at it.

There are now four Federal District Court decisions and one Court of Appeals decision on the subject, all of which have held in essence that the revolving body of a debtor's accounts receivable or inventory are an entity to be treated as such without regard to the exact date on which a particular account or item of inventory making up the entity arose, or was acquired. The courts have likewise held that such treatment accords with the established, sound, busi-

ness, commercial and banking practice as well as with the intent and clear meaning of Section 60 of the Bankruptcy Act. These cases are:

Rosenberg v. *Rudnick* (1967), 262 F. Supp. 635 (D. C., Mass.);

In Re White (1967), 283 F. Supp. 208 (D. C., Ohio);

In Re Portland Newspaper Publishing Company, Inc. (1967), 271 F. Supp. 395 (D. C., Ore.);

Grain Merchants of Indiana, Inc., et al., Bankrupts, Mark L. France, Trustee v. *Union Bank and Savings Company Bellevue, Ohio* (1968), 286 F. Supp. 596 (D. C., Ind.);

Grain Merchants of Indiana, Inc., et al., Bankrupts, Mark L. France, Trustee v. *Union Bank and Savings Company, Bellevue, Ohio* (1969), 408 F. 2d 209 (C. A. 7).

Respondent is aware that the decision in the Oregon District Court (*In Re Portland Newspaper Publishing Company, Inc., supra*) is presently pending on appeal in the United States Court of Appeals for the Ninth Circuit. There is no conflict in the courts at the present time, however, and Respondent anticipates no conflicting decision because of the clarity of the precedent on the issue, not only in the cases above cited but also in those which fathered them.

The pre-Code ancestry of these decisions is to be found in the following older and important cases:

In Re Pusey, Maynes, Breish Company (1941), 122 F. 2d 606 (C. A. 3). In this case, Judge Goodrich defined the substitution of collateral approach to the nature of later arising receivables replacing those the proceeds of which were used in the business of the borrower.

Rockmore v. *Lehman* (1942), 129 F. 2d 892 (C. A. 2), Cert. den. 317 U. S. 700. In Rockmore, Judge Augustus

Hand held that the date of the assignment of a contract controlled, for purposes of the then version of Section 60 of the Bankruptcy Act, rather than the date when the proceeds of the contract came into existence thereafter.

Manchester National Bank v. *Roche* (1951), 186 F. 2d 827 (C. A. 1). Here Judge Magruder first stated the entity or *res* concept of the commercial nature of a debtor's inventory and accounts receivable.

Mathews v. *James Talcott Inc.* (1965), 345 F. 2d 374 (C. A. 7) Cert. den. 382 U. S. 837. In this case Judge Swygart held that a pre-Code factor's lien applied to all items of inventory without regard to how frequently designations were made as the company sold or added items to its inventory and that it was the date the factor's lien notice was filed that controlled not the dates when inventory designations occurred.

The purported conflict between Bankruptcy Act 60 and Uniform Commercial Code § 9-108 is no more than a straw man set up for the convenient purpose of easily shooting it down. Judge Eschbach, in the District Court below, made his decision without the aid of Section 9-108 but pointed out that he found that section in no way inconsistent with a rational interpretation of Section 60 of the Bankruptcy Act and with its legislative history. Judge Cummings, speaking for the unanimous Court in the Seventh Circuit below, stated that Section 9-108 merely codifies as state law the substitution of collateral doctrine first asserted in *In Re Pusey, Maynes, Breish Company, Inc., supra,* but in any event the section is unnecessary to the decision in this case.

The proponents of this purported conflict (including Petitioner) are uniformly careless with the term "perfected" as it appears in Section 60 of the Bankruptcy Act and various places in the Uniform Commercial Code.

Here, whatever use the Uniform Commercial Code may make of the term in various contexts, we are concerned only with its use in Section 60 of the Bankruptcy Act. There the phrase is "so far perfected" as to cut off a simple judgment lien creditor. This is quite different from the full perfection envisioned by the Uniform Commercial Code which requires *attachment* (9-303 (1)) and *existence* (9-204 (2)).

Ironically, Petitioner, on the one hand asserts conflict between Section 9-108 of the Uniform Commercial Code and Section 60 of the Bankruptcy Act. Finding such purported conflict, Petitioner asserts the obvious supremacy of the Bankruptcy Act.

On the other hand, Petitioner while constantly ignoring the clearly enunciated bankruptcy standard of "so far perfected" that no subsequent judgment lien creditor could gain priority, nevertheless insists on imposing on the court the state standard of *full* perfection as set out in Sections 9-204 (1) and (2) and 9-303 (1) of the Uniform Commercial Code.

Since the Bankruptcy Act contains a complete definition of the perfection necessary to a non-preferential transfer, the attempt to resort to a state law definition of perfection is futile and inappropriate.

Basically a very simple proposition is involved here. Where the Bank's interest in the debtor's accounts receivable, which arose after the last date new value was given and during the four months pre-bankruptcy period is "so far perfected" prior to that time that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior (Bankruptcy Act § 60), the transfer of the bankrupt's property occurred prior to the pre-bankruptcy four months period and was not for an antecedent debt. Consequently, one of

the seven requirements for a forbidden preference, as provided in Section 60 of the Bankruptcy Act, is missing and no perference exists. Thus the issue is determined simply by applying the Bankruptcy Act. In order to find when such limited degree of perfection takes place, the courts have always looked to state law—in this case, the Uniform Commercial Code. *McKenzie v. Irving Trust Co.*, 323 U.S. 365 (1945). The specific sections of the Code to which the courts now look are 9-204 (3) and 9-301 (1)(d). The effect of these provisions is that no subsequent judgment creditor could obtain a lien superior to that of the Bank's security interest.

In addition, when the bank creditor permitted the debtor to withdraw the proceeds of collected accounts receivable generally at about the same rate as new accounts were created, the transfer to the bank of new accounts would be in substitution for those so withdrawn and would not deplete the estate of the debtor. This substitution of accounts meant that the Bank did not "obtain a greater percentage of its debt than some other creditors of the same class" (Bankruptcy Act, Section 60(a)(1)). Therefore a second element of preference was not proven. Hence again one of the elements necessary to create a § 60 forbidden preference is missing.

On both these aspects of the case the courts below concluded in favor of the Bank and against the Trustee. A finding against the Trustee on either point requires a decision against him because they are two of the seven essential elements the existence of which Section 60 of the Bankruptcy Act requires in order to establish a forbidden preferential transfer.

At page 10 of his Brief, Petitioner urges that Sections 70(c) (1) and (2) of the Bankruptcy Act, alone, place the Trustee in a position of superiority over the Bank as to all

the accounts receivable arising after September 20, 1966. Section 70(e) depends on Section 70(c) which in turn is operable only as of the date of bankruptcy, not four months prior thereto. In this case the Bankrupt terminated business on September 30, 1966 and petitioned for bankruptcy on October 27, 1966. Obviously, therefore, all accounts receivable in issue were in actual existence prior to the bankruptcy date and consequently, even in terms of Petitioner's own argument, the Bank's interest was fully perfected almost a month before the Trustee acquired any Section 70(c) rights.

Petitioner attempts, also, through his analogy to the old choate lien test under the pre-1966 Tax Lien Act to again assert a full perfection test for the transfer required by Section 60 of the Bankruptcy Act to avoid illegal preferences. As previously noted, Section 60 provides for a less than full Code perfection in determining when a transfer occurs for bankruptcy preference purposes. It should also be noted that Section 6323 of the 1966 Tax Lien Act ameliorates the choate lien test in UCC situations.

The legislative history of Section 60 of the Bankruptcy Act is thoroughly dealt with by both Judge Eschbach in the District Court decision and Judge Cummings in the Court of Appeals ruling below. From their comments on the subject, it is clear that the amendments of this section in 1903, 1910, 1926, 1938 and 1950 show a present legislative intent to permit business financing through a creditor's lien on a rotating stock of accounts receivable, subject only to certain mechanical steps required of the creditor which are not in issue here.

The lack of any substance to the question raised by Petitioner is additionally evidenced, as pointed out by the

Court of Appeals, by the current proposals of the National Bankruptcy Conference to further amend Section 60 to specifically reflect in its language the now well-accepted substitution of collateral doctrine, provided only that the security interest created by the security agreement may not apply to an aggregate of accounts receivable on the date of the bankruptcy petition greater than the aggregate of accounts receivable existing four months prior to bankruptcy. From the Court of Appeals Appendix it is clear that even under this rule there would be no forbidden preference in this case. Cf. *In re Hygrade Envelope Corp.*, 393 F. 2d 60 (C. A. 2, 1968).

The parties to this matter followed common commercial and business practice and the precedent established in the cases cited by Respondent herein, treating the borrower's accounts receivable as an entity or stock. Only the total of its accounts receivable was involved in the amount Grain Merchants could borrow. Any reference to a particular receivable, whether in terms of time or source, was in no way in the minds of the parties.

CONCLUSION

Clearly, there is no substantial federal question in need of settlement by this court.

The decision below in the Court of Appeals [and in the District Court] is correct. It conforms to long settled federal precedent which has never been seriously challenged by any court. It agrees fully with the only other (three District Court) opinions directly in point on the subject. There is no conflict among any of the courts below. There is no actual statutory conflict requiring further judicial attention. All the courts which have dealt with the subject found that

UCC § 9-108 either was not necessary to its decision or merely accorded with the proper interpretation and application of § 60 of the Bankruptcy Act, or both.

In consquence certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Corrected Statement Regarding the Opinions Below.

1. Of the amount of $52,441.49 ordered by the Referee in Bankruptcy turned over by Union Bank and Savings Company to Mark L. France, Trustee, $7,116.52 was held by the bank in escrow for the benefit of the Trustee under agreement entered into between the Bank and the Trustee in open court. The actual amount in controversy after the entry of the Referee's order was therefore not $52,441.49 but was $45,324.97. This order was based on the Referee's conclusion that the transfer of these post-September 20, 1966 accounts receivable was preferential.

2. The United States District Court for the Northern District of Indiana set aside the Referee's order and held that no preferential transfer of accounts receivable occurred as to the principal amount owed to the Bank, together with interest. The matter was remanded to the Referee only for further proceedings on the secondary question of whether proceeds of accounts receivable could be also applied to satisfy two other notes which were otherwise collateralized by warehouse receipts on certain grain storage.

APPENDIX B.

Statutes Involved.

A. Bankruptcy Act.

Section 60a(1), (2) (11 U. S. C. Sec. 96a (1), (2)):

Sec. 60. Preferred Creditors. a. (1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

(2) For the purpose of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee . . . (I)f any transfer . . . is not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of the petition.

Section 60b (11 U. S. C. Sec. 96b):

b. Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent . . .

Section 1(30) (11 U. S. C. Sec. 1(30)):

(30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor;

B. Uniform Commercial Code (Indiana).

Section 9-105 (Burns 19-9-105):

19-9-105. *Definitions and index of definitions.*—(1) In this Article unless the context otherwise requires: * * *

(c) "Collateral" means the property subject to a security interest, and includes accounts, contract rights, and chattel paper which have been sold;

(d) "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts, contract rights, or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires: * * *

Section 9-106 (Burns 19-9-106):

19-9-106. *Definitions—"Account"—"Contract right"—"General intangibles."*—"Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper.

"Contract right" means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper.

"General intangibles" means any personal property (including things in action) other than goods, accounts, contract rights, chattel paper, documents and instruments.

Section 9-108 (Burns 19-9-108):

19-9-108. *When after-acquired collateral not security for antecedent debt.*—Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given.

Section 9-201 (Burns 19-9-201):

19-9-201. *General validity of security agreement.*—Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors.

Section 9-203(1) (Burns 19-9-203(1)):

19-9-203(1). *Enforceability of security interest—Proceeds, formal requisites.*—(1) . . . a security interest is not enforceable against the debtor or third parties unless

(a) The collateral is in the possession of the secured party; or

(b) The debtor has signed a security agreement which contains a description of the collateral . . . In describing

collateral, the word "proceed" is sufficient without further description to cover proceeds of any character. * * *

Section 9-204 (Burns 19-9-204):

19-9-204. *When Security interest attaches.—After-acquired property.—Future advances.*—(1) A security interest cannot attach until there is agreement (subsection (3) of Section 1-201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.

(2) For the purpose of this section the debtor has no rights . . . (c) In a contract right until the contract has been made; (d) in an account until it comes into existence.

(3) . . . a security agreement may provide that collateral, whenever acquired, shall secure all obligations covered by the security agreement . . .

Section 9-205 (Burns 19-9-205):

19-9-205. *Use or disposition of collateral without accounting permissible.*—A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral (including returned or repossessed goods) or to collect or compromise accounts, contract rights, or chattel paper, or to accept the return of goods or make repossessions, or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral. This section does not relax the requirements of possession where perfection of a security interest depends upon possession of the collateral by the secured party or by a bailee.

Section 9-301 (Burns 19-9-301):

19-9-301. *Persons who take priority over unperfected security interest.—"Lien creditor."*—(1) Except as other-

wise provided in subsection (2), an unperfected security interest is subordinate to the rights of

(a) persons entitled to priority under section 19-9-312;

(b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected;

(c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;

(d) in the case of accounts, contract rights, and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.

(2) If the secured party files with respect to a purchase money security interest before or within ten (10) days after the collateral comes into possession of the debtor, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

(3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment. Unless all the creditors represented had knowledge of the security interest such a representative of creditors is a lien creditor without

knowledge even though he personally has knowledge of the security interest.

Section 9-303(1) (Burns 19-9-303(1)):

19-9-303(1). *When security interest is perfected.—Continuity of perfection.*—(1) A security interest is perfected when it has attached and when all the applicable steps required for perfection have been taken . . . If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.

Section 9-306 (Burns 19-9-306):

19-9-306. *"Proceeds."—Secured party's rights on disposition of collateral.*—(1) "Proceeds" includes whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of. The term also includes the account arising when the right to payment is earned under a contract right. Money, checks and the like are "cash proceeds." All other proceeds are "Non-cash proceeds."

(2) Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected 10 days after receipt of the proceeds by the debtor unless

(a) a filed financing statement covering the original collateral also covers proceeds; or

(b) the security interest in the proceeds is perfected before the expiration of the 10-day period.

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest

(a) in identifiable non-cash proceeds;

(b) in identifiable cash proceeds in the form of money which is not commingled with other money or deposited in a bank account prior to the insolvency proceedings;

(c) in identifiable cash proceeds in the form of checks and the like which are not deposited in a bank account prior to the insolvency proceedings; and

(d) in all cash and bank accounts of the debtor, if other cash proceeds have been commingled or deposited in a bank account, but the perfected security interest under this paragraph (d) is

(i) subject to any right of setoff; and

(ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within 10 days before the institution of the insolvency proceedings and commingled or deposited in a bank account prior to the insolvency proceedings less the amount of cash proceeds received by the debtor and paid over to the secured party during the 10-day period. * * *

APPENDIX C.

Chart Showing Correct Facts of the Case.

Trustee's Original Turnover Petition (Petitioner's App. p. 2A)

Account offset 10-3-66	$ 46,995.22
August, '66 accounts receivable	37,727.01
September, '66 accounts receivable	98,049.95
Total	$182,772.18

Actual Collections by Bank (Petitioner's App. p. 28A)

Sources other than receivables	$ 31,730.64
Receivables existing on or before 9-20-66	75,199.94
Receivables existing after 9-20-66	52,441.49
Total	$159,372.07

Debt due Bank (incl. interest) (Petitioner's App. p. 28A)

December 1965 Notes	$ 51,059.52
September 20, 1966 Note	100,596.03
Total	$152,255.55

Referee's Turnover Order

Bank keeps:

Sources other than receivables		
Bank offset	$17,928.49	
Grain Sales	13,802.15	
	$31,730.64	
Pre 9-20-66 Receivables	75,199.94	
Total		$106,930.58

(This amount not contested by Trustee.)

Remit to Trustee:

Post 9-20-66 receivables	$ 52,441.49
Less amount in escrow	— 7,116.62
Balance in controversy	$ 45,324.97

District Court's Order (Petitioner's App. p. 39A)
(On Petition for Review by Union Bank.)

Bank keeps:	
Pre 9-20-66 receivables ordered by Referee	$ 75,199.94
Additional receivables up to total of 9-20-66 Note	25,396.09
Total	$100,596.03
Sources other than receivables	31,730.64
Total	$132,326.67
Remanded on Question of additional collateral for December, 1965 Notes	$ 19,928.88

Court of Appeals Order (Petitioner's App. p. 58A)
(On Appeal by Trustee.)
Order of U. S. District Court affirmed.

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*Note: Includes $7,116.62 held in escrow for the Account of Trustee as per stipulation in open court.

COMMENT.

As indicated by the foregoing, in addition to the $100,000.00 note to which Petitioner refers in his Statement of the Case, there were two notes in the amount of $20,000.00 and $30,000.00 respectively, upon which interest had accrued in the amount of $1,059.50. Union Bank applied to the payment of these notes, from the accounts receivable it collected, the amount of $19,928.88 previously referred to. This amount is a part of the total amount of $45,324.97 which is in controversy here since, unless it may be retained by Union Bank under the decisions of the United States District Court and of the Court of Appeals for the Seventh Circuit, the question of whether it constitutes additional collateral for the two smaller notes is academic.

APPENDIX D.

Outline of Bases of Court of Appeals Decision Below.

1. By promptly filing financing statements in accordance with the Uniform Commercial Code, the Bank's security interest in future accounts receivable became superior to subsequent liens obtainable by "proceedings on a simple contract" as per Section 60a (2) of the Bankruptcy Act. (See Petitioner's Appendix p. 47 A.)

2. The prior record notice, which the financing statements constituted, relates forward to the four month pre-bankruptcy period sufficient to give the secured party priority over subsequently attaching judgment creditor's liens, including those of a bankruptcy trustee. (See Petitioner's Appendix p. 50 A.)

3. No transfer "on account of an antecedent debt" occurred because in actual business and banking practice receivables are treated as a single entity. (See Petitioner's Appendix p. 51 A.)

(Note: The District Court called them a "stock of accounts receivable"—see Petitioner's Appendix p. 33 A, and both courts found this consistent with Section 60 of the Bankruptcy Act.)

4. No transfer "on account of an antecedent debt", or one having the effect of enabling the creditor "to obtain a greater percentage of his debt than some other creditor of the same class", occurred because of the application of the Bank's lien to the post September 20, 1966 accounts receivable. Since such application did not deplete the bankrupt's estate available to general creditors, (i.e., the newly arising accounts receivable merely replaced prior

collateral being released to the debtor and the relative position of the bank to the debtor, and hence to the debtor's general creditors, did not alter) no harm resulted to him or them. (See Petitioner's App. p. 5 A.)

5. Section 9-108 of the Uniform Commercial Code is not necessary to the decision in favor of the Bank, but it is not in conflict with Section 60 of the Bankruptcy Act, properly interpreted and applied, but rather is merely a codification of the substitution of collateral doctrine implicit in the Bankruptcy Act. (See Petitioner's App. p. 57 A.)